

Larry A. Hammond, 004049
Anne M. Chapman, 025965
OSBORN MALEDON, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
(602) 640-9000
lhammond@omlaw.com
achapman@omlaw.com

John M. Sears
P.O. Box4080
Prescott, Arizona 86302
(928) 778-5208
John.Sears@azbar.org

Attorneys for Defendant

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JAN -8 PM 3:45

JEANNE HIGGS, CLERK

BY: N. Adams

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

) No. P1300CR20081339
)
) Division 6
)
) **REPLY IN SUPPORT OF**
) **MOTION TO DECLARE DEATH**
) **QUALIFICATION OF THE JURY**
) **UNCONSTITUTIONAL FOR ITS**
) **FAILURE, IN PRACTICE, TO**
) **MEET THE MINIMUM**
) **CONSTITUTIONAL**
) **REQUIREMENTS SET FORTH**
) **IN *FURMAN*, *GREGG* AND**
) **THEIR PROGENY**

The State responds to Mr. DeMocker's motion to strike the death notice or adopt the two jury procedure afforded a defendant in New Mexico by complaining that to grant the motion would take too much of the Court's time. The Court should reject this argument in the face of the overwhelming and undisputed social science

1 research that concludes that the death penalty is incapable of being applied in a
2 manner that comports with federal and state constitutional precedents.

3
4 While the State's response cites to several Arizona Supreme Court cases
5 considering death qualification to support its assertion that the Arizona Supreme
6 Court has rejected the findings of the Capital Jury Project, these cases are in
7 inapposite. In each of the cases cited by the State the court, not the jury, was the
8 sentencer. (See State's response at page 3 citing *State v. Hoskins*, 199 Ariz. 127, 141,
9 14 P.3d 997, 1011 (200); *State v. Lee*, 189 Ariz. 608, 617, 944 P.2d 122, 1231 (1997);
10 see also *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995); *State v.*
11 *West*, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993), *overruled on other grounds*,
12 *State v. Rodriguez*, 192 Ariz. 58, 64, 961 P.2d 1006, 1012 (1988); *State v. Schaaf*, 169
13 Ariz. 323, 331, 819 P.2d 909, 917 (1991)). As the State knows, unlike in any of the
14 cases it cited, the jury will impose any sentence on Mr. DeMocker. Therefore, the
15 prejudicing effects of death qualification on juries as sentencers have not previously
16 been considered, let alone rejected, by the Arizona Supreme Court. The State has
17 cited no case from the Arizona Supreme Court addressing the issue of death
18 qualification where the jury is the sentencer. Equally important, in no case cited by
19 the State does the Arizona Supreme Court discuss or address in any way any of the
20 findings of the Capital Jury Project. In fact, counsel could locate no Arizona case
21 discussing these important findings. The State's citation to *McCree* is likewise
22 inapposite. In *McCree* the question was whether the Constitution prohibited the
23 removal for cause of a juror who, because of her opposition to the death penalty
24 would be prevented from or substantially impaired in the performance of her duties at
25 sentencing. *Lockhart v. McCree*, 476 U.S. 162, 106 S Ct. 1758 (1986). Furthermore,
26 the Capital Jury Project was neither presented to nor considered by the Supreme Court
27 in *McCree*.

1 The undisputed Capital Jury Project data provided to this Court establishes the
2 presence of:

- 3 1. Rampant premature decision-making which renders the penalty phase
4 meaningless;
- 5 2. The failure of jury selection to remove large numbers of death-biased jurors,
6 and the overall biasing effect of the selection process, itself;
- 7 3. The pervasive failure to comprehend and/or follow penalty instructions;
- 8 4. The wide-spread belief that death is required;
- 9 5. Wholesale evasion of responsibility for the punishment decision;
- 10 6. The continuing influence of race on juror decision-making; and
- 11 7. Significant underestimation of the alternative to death.

12
13 Each one of these problems “reflects a fundamental flaw in the system; viewed
14 altogether the evidence of system failure is overwhelming.”¹

15 The State’s response does not address that these findings demonstrate a
16 violation of a series of Supreme Court decisions. These include: *Eddings v.*
17 *Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 877 (1982), holding that the sentencer
18 must be able to both hear and give effect to mitigation; *Witherspoon v. Illinois*, 391
19 U.S. 510, 88 S.Ct. 1770 (1968), holding that a sentence of death returned by a jury
20 biased toward death violates the Constitution; *Simmons v. South Carolina*, 512 U.S.
21 154, 114 S.Ct. 2187 (1994), holding that the Due Process Clause of the Fifth and
22 Fourteenth Amendments is violated where the capital sentencing decision is made on
23 the basis of false, inaccurate, or misleading information; *Lockett v. Ohio*, 438 U.S.
24 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), holding that capital jurors must be
25 permitted to consider a wide range of mitigating circumstances in deciding whether
26

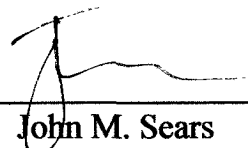
27 ¹ (See App. A to original motion: Bowers, Foglia, Still Singularly Agonizing: Law’s Failure To Purge
28 Arbitrariness From Capital Sentencing (2003) 39 Crim. Law Bulletin 51, 86.)

1 death is the appropriate sentence; *Roberts v. Louisiana*, 431 U.S. 633, 97 S.Ct. 1993
2 (1977), holding that death can never be the only appropriate penalty; *Caldwell v.*
3 *Mississippi*, 472 U.S. 320, 105 S.Ct. 2633 (1985), holding that each juror must
4 understand that he or she, alone, is responsible for his or her sentencing decision; and
5 *Turner v. Murray*, 476 U.S. 28, 33-35, 106 S.Ct. 1683, 1686-1688 (1986), holding
6 that race cannot play any role in the capital jury's decision-making. Each of these
7 fundamental Supreme Court decisions is violated by the current practice of death
8 qualification as evidenced by the Capital Jury Project findings.

9
10 Mr. DeMocker thus requests that this Court dismiss the State's Notice of Intent
11 to Seek Death and prohibit the State from seeking the death penalty in this case. In
12 the alternative, Mr. DeMocker asks this Court to adopt the "two jury" procedure from
13 New Mexico. Under this approach, the judicial economy urged by the State is most
14 likely to be achieved. If Mr. DeMocker is found not guilty, the Court could avoid
15 entirely the necessarily time consuming process of death qualification. This process
16 at least attempts to minimize some of the devastatingly unconstitutional consequences
17 of a death qualified jury at the guilt/innocence phase of Mr. DeMocker's trial.

18 DATED this 8th day of January, 2010.

19 By:



John M. Sears
P.O. Box 4080
Prescott, Arizona 86302
(928) 778-5208

22
23 OSBORN MALEDON, P.A.
24 Larry A. Hammond
25 Anne M. Chapman
26 2929 N. Central Avenue, Suite 2100
27 Phoenix, Arizona 85012-2793

28 Attorneys for Defendant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ORIGINAL of the foregoing filed
this 8th day of January, 2010, with:

Jeanne Hicks
Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

COPIES of the foregoing hand delivered
this 8th day of January, 2010, to:

The Hon. Thomas B. Lindberg
Judge of the Superior Court
Division Six
120 S. Cortez
Prescott, AZ 86303

Joseph Butner, Esq.
Office of the Yavapai County Attorney
Prescott courthouse dra

By: 